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August 8, 2007

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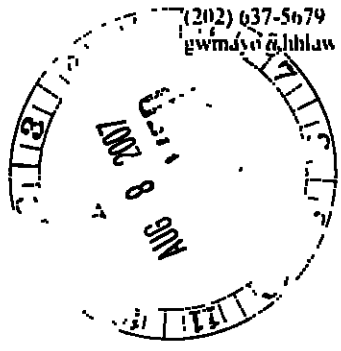


BY HAND

The Honorable Vernon A Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C 20024

Re STB Finance Docket No 34953
Midtown TDR Ventures LLC – Exemption To Acquire Line
American Premier Underwriters, Inc , The Owasco River Railway, Inc ,
and American Financial Group, Inc.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the following Midtown TDR Ventures LLC's Submission of Supplemental Information Pursuant to Board Request

If you have any questions or I can be of any assistance, please let me know

Respectfully,

George W Mayo, Jr.

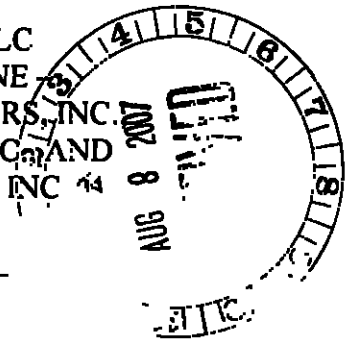
Enclosures

219982

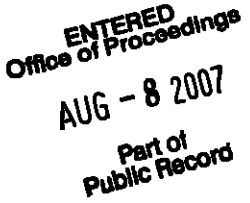
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34953

MIDTOWN TDR VENTURES LLC
– EXEMPTION TO ACQUIRE LINE –
AMERICAN PREMIER UNDERWRITERS, INC.,
THE OWASCO RIVER RAILWAY, INC., AND
AMERICAN FINANCIAL GROUP, INC.



**MIDTOWN TDR VENTURES LLC'S**
**SUBMISSION OF SUPPLEMENTAL INFORMATION**
**PURSUANT TO BOARD REQUEST**

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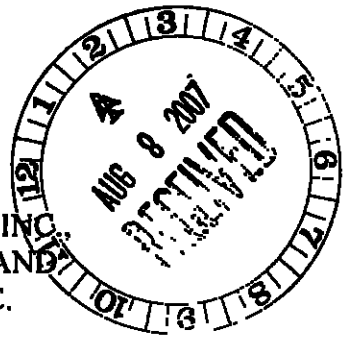
ATTORNEYS FOR MIDTOWN TDR
VENTURES LLC

Dated: August 8, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34953

MIDTOWN TDR VENTURES LLC
– EXEMPTION TO ACQUIRE LINE –
AMERICAN PREMIER UNDERWRITERS, INC.,
THE OWASCO RIVER RAILWAY, INC., AND
AMERICAN FINANCIAL GROUP, INC.




**MIDTOWN TDR VENTURES LLC'S**
**SUBMISSION OF SUPPLEMENTAL INFORMATION**
**PURSUANT TO BOARD DIRECTION**

Midtown TDR Ventures LLC ("Midtown") hereby submits the supplemental information set forth below, as requested by the Board in its decision served June 8, 2007 (the "June 8 Decision").[1]

In this proceeding, Midtown filed a verified notice of exemption ("Midtown Exemption Notice") under 49 CFR 1150.31 to enter into a transaction (the "Transaction") to acquire: (a) the fee position underlying a 156-mile rail line, known as the Harlem-Hudson Line (sometimes referred to as the "HH Line"); (b) the fee position underlying Grand Central Terminal (the "GCT Fee"); and (c) certain development rights appurtenant to the GCT Fee (the "GCT Air Rights") (the HH Line, the GCT Fee and the GCT Air Rights being collectively referred to herein as the "Subject Properties"). The sellers of the Subject Properties (collectively, the "Sellers") were: (i) American Premier Underwriters, Inc. ("APU"), a noncarrier and the

[1] In a decision served July 13, 2007, the Board extended the due date for Midtown's submission of the requested supplemental information to August 8, 2007

successor by merger to The New York & Harlem Railroad Company ("NY&H"): (ii) APU's wholly owned subsidiary, The Owasco River Railway, Inc. ("Owasco"), a noncarrier; and (iii) APU's parent, American Financial Group, Inc. ("AFG"), a noncarrier. Simultaneously with the filing of the Midtown Exemption Notice, Midtown filed a motion to dismiss its notice of exemption ("Midtown Motion To Dismiss"), on the grounds that the Transaction was not subject to the Board's jurisdiction because Midtown will not become a common carrier as a result of the Transaction.

In its June 8 Decision, the Board advised that "[b]ased on the record in this proceeding, the Board does not have enough information about the status of the common carrier rights and obligations on the Line to determine whether Midtown, upon purchase of the Subject Property, obtained, or will obtain rail carrier status Midtown has not accounted for the possible common carrier obligations held by one of the Sellers, NY&H, which Midtown indicates operated on the Line. Because questions still remain as to the status of the parties with respect to the common carrier obligation, . . . additional information is requested from Midtown." Id. at 2.

Each of the Board's three requests for additional information is set forth below, followed by Midtown's response to the request.

**Request No. 1** Midtown should provide information as to whether Sellers conveyed any and all common carrier obligations they held exclusively to MTA through the MTA lease and held no common carrier rights or obligations at the time they entered into the Purchase Agreement with Midtown

**Response**: Based on information available to Midtown:

(i) Sellers had no common carrier obligations in regard to the HH Line and therefore no such common carrier obligations were conveyed either to (a) the Metropolitan Transportation Authority (the "MTA") pursuant to the "Amended and Restated Agreement of Lease between American Premier Underwriters, Inc. and The Owasco River Railway, Inc.,

Landlord, and Metropolitan Transportation Authority, Tenant" dated as of April 8, 1994 (the "MTA Lease") (see Midtown Motion To Dismiss, Ex. B), or to (b) Midtown pursuant to the Transaction; and

(ii) If, contrary to the evidence, Sellers somehow retained vestigial common carrier obligations with respect to the HH Line, whatever such obligations may have resided with Sellers were conveyed to the MTA pursuant to the MTA Lease (and its predecessors), which was comprehensive in scope and which conveyed all control over the HH Line to the MTA for approximately the next two-hundred and seventy years

In the discussion below, we address each of these points in order.

I.

To understand why the Sellers did not bear any common carrier responsibilities related to the HH Line, it is necessary to trace the complicated history of the HH Line and the freight railroad operations over it. Prior to 1873, the Harlem Division of the HH Line[2] (the "Harlem Line") was owned in fee by the NY&H. In 1873 the properties making up the Harlem Line were leased in their entirety to a predecessor of the Penn Central Transportation Company ("PCTC") for a term of 401 years (the "1873 Lease"). Under the 1873 Lease, PCTC effectively had "the right of fee owners." See In the Matter of Penn Central Transp. Co., 335 F. Supp 835, 836-37 (D. Pa. 1971) The Hudson Division of the HH Line[3] (the "Hudson Line") was owned in fee by PCTC. Id. As the owner/long-term lessee of both the Harlem Line and the Hudson Line, PCTC provided rail freight service over the entire HH Line.

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2 See Midtown Exemption Notice, Ex A.

3 Id

In the Harlem-Hudson Lease Agreement dated June 1, 1972 (the "1972 Lease"), the Trustees of the then-bankrupt PC I C (the "PCTC Trustees") agreed to lease both the improvements over the GCT Fee (the "GC I' Buildings") and the IIII Line to the MTA for a term of 60 years (with provision for six additional consecutive five-year terms). The 1972 Lease reserved to PCTC the right to continue to conduct freight operations over the HH Line A companion Harlem-Hudson Service Agreement (the "1972 Service Agreement") between the PCTC Trustees and the MTA provided that (a) PCTC would provide commuter service over the IIII Line at the request of the MTA, and (b) the MTA would bear financial responsibility for this commuter service. See Consolidated Rail Corp. v. Metro-North Commuter R R., 598 F. Supp. 1571, 1575-76 (Sp. Ct R R.R.A. 1984) ("Conrail/Metro-North I").

Under the April 1, 1976 conveyances (collectively, the "Rail Act Conveyances") effected pursuant to the Final System Plan (governed by the Regional Rail Reorganization Act of 1973 (the "Rail Act")), the PCTC trackage rights over the HH Line (and the appurtenant obligations to provide freight service over the HH Line) that had been reserved by PCTC pursuant to the 1972 Lease were transferred to Consolidated Rail Corporation ("Conrail"), as was PCTC's obligation to provide commuter service over the HH Line pursuant to the 1972 Service Agreement Id. at 1576. As to fee ownership of the IIII Line, the fee underlying the Hudson Line continued to be owned by NY&H,[1] and the fee underlying the Harlem Line was retained by the PCTC bankruptcy estate. See Metropolitan Transp. Auth. v. ICC, 792 F.2d 287, 291 (2d Cir ), cert. denied, 479 U S. 1017 (1986)

In 1978, the district court overseeing the PCTC bankruptcy approved a plan of reorganization for PCTC. See Matter of Penn Central Transp. Co., 458 F Supp. 1234 (E.D. Pa.

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[1] PC I C owned 95% of the stock of NY&H See Matter of Penn Central Transp Co., 458 F Supp 1234, 1307 (E D Pa 1978)

1978) (approving reorganization plan); Matter of Penn Central Transp Co., 458 F. Supp. 1364 (E D Pa 1978) (entering confirmation order related to plan). As described by that court:

> The assets of the Debtor were marshaled and redistributed among its creditors and other claimants; the unsecured creditors were paid largely in stock, plus some contingent debt securities – a type of distribution normally associated with an insolvent company; and the reorganized company did not continue in the railroad business, but principally manages its investments.

Matter of Penn Central Transp. Co., 1990 WL 117974, *4 (E.D. Pa. Aug. 9, 1990) (emphasis added), rev'd on other grounds, 994 F.2d 164, 169 (3d Cir. 1991) (court noted that Debtor PCTC had conveyed its "rail operations" to others), cert denied, 503 U.S. 906 (1992).[5]

Penn Central Corporation was the reorganized entity that emerged from bankruptcy following entry of the district court's PCTC reorganization consummation order (the "PCTC Reorganization Order"). The PCTC Reorganization Order did not provide that Penn Central Corporation carry forward any of the common carrier liabilities, responsibilities or obligations previously borne by PCTC As explained by the Special Court for Regional Rail Reorganization:

> But it was equally rational for Congress and the USRA, and in greater accordance with the general plan of the Rail Act which provides only for the conveyance of assets or rights used or useful in transportation, § 102(12), 45 U.S.C. § 702(14), to have provided that when Penn Central was obliged to convey the bulk of its transportation assets to Conrail and others, it should retain its nontransportation

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5 As described by the court overseeing the PCTC bankruptcy,

> The assets remaining after conveyance to Conrail [fell] into two principal categories (1) Penn Central's ongoing, successfully operating, non-railroad business enterprises, principally consolidated in the Pennsylvania Company (Penneo), and (2) a variety of real estate and other investments

Matter of Penn Central Transp Co., 458 F Supp at 1254-55 There were no common carrier obligations which grew out of ownership of these properties Under the Rail Act, "railroads in reorganization subject to the Act [were] free to abandon service and dispose as they wish of any rail properties not designated for transfer under the Final System Plan, §§ 304(a)-(c), 45 U S C §§ 744 " Blanchette v Connecticut General Ins Corp., 419 U S 102, 116-17 (1974)

> assets free and clear of any burdens with respect to transportation service. This, as we read § 303(b)(2) of the Rail Act and the FSP, was what Congress and the USRA intended to do.

Penn Central Corp. v. Consolidated Rail Corp., 611 F. Supp. 285, 292 (Sp. Ct. R.R.R.A. 1985).

Thus, the combined effect of the 1972 Lease, the 1972 Service Agreement, the Rail Act, the Rail Act Conveyances, the PCTC Reorganization Order and the applicable case law was to remove from PCTC and Penn Central Corporation all liabilities, responsibilities and obligations to provide common carrier freight service over the HH Line and to vest such liabilities, responsibilities and obligations in Conrail. These transfers of the liabilities, responsibilities and obligations regarding the provision of freight service over the HH Line did not affect NY&H's ownership of the fee to the Harlem Line. Penn Central Corporation's ownership of the fee to the Hudson Line, or the rights of the MTA under the 1972 Lease or the 1972 Service Agreement.

Penn Central Corporation subsequently changed its name to American Premier Underwriters, Inc., one of the Sellers in this proceeding. See United States v. National Railroad Passenger Corp., 1999 WL 199659, *1 (E.D. Pa., Apr. 6, 1999), aff'd sub nom., United States v. Southeastern Pennsylvania Transp. Auth., 235 F.3d 817 (3d Cir. 2000). APU has previously been recognized as a noncarrier. See Danbury Terminal R.R. – Discontinuance Exemption – Westchester, Putnam, and Dutchess Counties, NY, 1995 WL 144574, *1 (STB served Apr. 5, 1995).

In 1981, Congress enacted the Northeast Rail Service Act of 1981 ("NRSA"), which had as one of its objectives relieving Conrail of all commuter-service obligations. NRSA provided for the creation of Amtrak Commuter ("Amtrak Commuter"), thereby making Amtrak Commuter available to take over commuter service being provided by

Conrail if this was satisfactory to the relevant commuter authorities and an appropriate agreement could be negotiated Amtrak Commuter was not obligated to assume any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974 for the continuation of rail passenger service. Among other things, NRSA specified that Conrail would retain appropriate trackage rights for freight operations over any rail properties owned or leased by such commuter authorities. Under NRSA, compensation for such trackage rights had to be just and reasonable. See Conrail/Metro-North I, 598 F. Supp. at 1577.

The MTA elected not to accept commuter service by Amtrak Commuter, and instead organized a wholly owned subsidiary, Metro-North Commuter Railroad Company ("Metro-North"), to provide such service Beginning January 1, 1983, Conrail ceased providing commuter service over the HH Line and the commuter service was taken over by Metro-North Conrail continued, however, to provide freight service over the HH Line pursuant to the trackage rights retained by PC TC under the 1972 Lease, which Lease provided that these trackage rights could be utilized by PCTC (Conrail's predecessor) largely for free; Conrail took the position that these economic terms continued to be governing. MTA countered that it was entitled to just and reasonable compensation under NRSA for Conrail's utilization of these trackage rights. Id. at 1578. The Special Court for Regional Rail Reorganization ruled in Conrail's favor, holding that even though NRSA relieved Conrail of its obligation to provide commuter service over the HH Line, Conrail (as successor to PCTC) was still entitled to utilize its "free" trackage rights over the HH Line. Id. at 1582-83.

Following this decision, MTA and Conrail negotiated a new trackage rights agreement, which was entered into on August 6, 1991 and was made retroactive effective

January 1, 1983 (the 1991 MTA/Conrail Trackage Rights Agreement").[6] See Midtown Motion To Dismiss, Ex. C at 1-2. CSX succeeded to Conrail's rights under the 1991 MTA/Conrail Trackage Rights Agreement as a consequence of the merger transaction approved by the Board in CSX Corp., et al – Control & Operating Leases/Agreements – Conrail, Inc., et al., STB Finance Docket No. 33388, 3 S T B. 96 (served July 23, 1998). Today, CSX continues to conduct freight operations over the HH Line pursuant to the 1991 MTA/Conrail Trackage Rights Agreement. See Midtown Exemption Notice at 5.

As demonstrated by the forgoing history, the common carrier obligations related to the HH Line have resided successively in PCTC (and its predecessors), Conrail, and CSX.[7] These obligations passed from PCTC to Conrail pursuant to the 1976 Rail Act Conveyances, and then from Conrail to CSX pursuant to 1998 acquisition of control approved by the Board In fact (a) the obligations to provide freight service over the HH Line never resided with the Sellers; (b) none of Sellers ever conducted rail freight operations over the HH Line, and (c) the only involvement of Sellers with the HH Line was as its fee owners (NY&H with respect to the Harlem Line and Penn Central Corporation/APU with respect to the Hudson Line)

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[6] This trackage rights agreement made clear that Conrail's rights were to be the same as they had been under predecessor agreements "This right [to perform freight service] shall be the same as that granted to the Penn Central Corporation in (1) the Harlem-Hudson Lease Agreement, as amended, (2) the MTA Purchase and Lease Agreement, as amended, and (3) the CTA Lease Agreement, as amended, and transferred to Conrail pursuant to the Final System Plan and affirmed by the Special Court in action No 83-14 " See Midtown Motion To Dismiss, Ex. C at 5

[7] The Delaware and Hudson Railway Company, Inc ("D&H") also conducts rail freight operations over the HH Line pursuant to trackage rights granted by MTA (actually, Metro-North) (the "D&H/MTA Trackage Rights Agreement") See Midtown Motion To Dismiss, Ex D But these trackage rights are relatively new, having been entered into in connection with the trackage rights awarded D&H in Delaware & Hudson Ry. – Trackage Rights – CSX Transportation, Inc., et al., STB Finance Docket No 33771, 1999 WL 485899 (STB, served July 8, 1999)

II.

Although there is no evidence that common carrier obligations related to the HH Line ever resided with the Sellers, if Sellers were somehow deemed to bear some form of vestigial common carrier obligations with respect to the HH Line, all such obligations were clearly transferred to MTA pursuant to the MTA Lease (and the predecessor agreements to such lease, originating with the 1972 Lease referenced in Midtown Motion To Dismiss, Ex. B at 1) As set forth in Section 2.01 of the MTA Lease, the Landlord (Sellers APU and Owasco) leased to MTA the "Premises," which are defined to mean "the Land, the Improvements, the Equipment, the Appurtenances and the Trackage Rights." See Midtown Motion To Dismiss, Ex B at 9, 11 (the capitalized terms are themselves defined in the MTA Lease).

The breadth of the MTA Lease is such that it affords MTA complete and unfettered control of the HH Line. See Metropolitan Transp. Auth. v. ICC, 792 F.2d 287, 291 (2d Cir.) (referring to the 1972 Lease, the Second Circuit explained that: "This arrangement enabled MTA to obtain full control over a substantial part of Penn Central's tracks, terminals, stations, shops, and yards by a single lease."), cert. denied, 479 U.S. 1017 (1986). The MTA Lease has a term which expires on February 28, 2274 (subject to other provisions of the MTA Lease which could affect its termination date), almost two hundred and seventy years in the future.

The MTA's role as the entity that totally controls the HH Line is exemplified by the fact that only the MTA (and its subsidiary, Metro-North, along with the Connecticut Department of Transportation as to properties owned by that entity) is a party to the 1991 MTA/Conrail Trackage Rights Agreement with Conrail. See Midtown Motion To Dismiss, Ex. C. Neither APU, NY&H, nor Owasco is a party to that agreement. The same is true in regard to

the D&H/MTA Trackage Rights Agreement referenced above; only Metro-North is a party to that agreement, and not any of the Sellers Id., Ex D

Under the MTA Lease, no vestigial common carrier obligations remained with the Sellers (indeed, as noted above, there is no evidence that Sellers ever had such obligations) Whatever obligations the Sellers had, these were transferred in their entirety to the MTA, subject to the trackage rights originally retained by PCTC pursuant to the 1972 Lease, and inherited successively by Conrail and then CSX

**Request No. 2** Midtown should include in their additional information a detailed explanation of the common carrier obligation held by NY&H while operating on the Line at any point in time and when those rights were discontinued.

**Response**. Based on the historical record, NY&H never had a common carrier obligation in regard to the HH Line. As explained above: (a) prior to 1873, the Harlem Line was owned in fee by the NY&H; (b) the Harlem Line was leased in its entirety to a predecessor of PCTC for a term of 401 years pursuant to the 1873 Lease; and (c) under the 1873 Lease, PCTC effectively had "the right of fee owners." See In the Matter of Penn Central Transp Co., 335 F. Supp. at 836-37 In addition, the 1873 Lease pre-dated enactment of the Interstate Commerce Act in 1887 (Act to Regulate Commerce of February 4, 1997, chapter 104, 24 Stat. 379), and there is no evidence that NY&H ever conducted common carrier freight operations on the HH Line following the 1873 Lease to PCTC Under these circumstances (i) NY&H has never had a common carrier obligation related to the HH Line, and (ii) the obligation to provide common carrier service over the HH Line resided exclusively with PCTC, from which it passed to Conrail and then to CSX.

**Request No. 3** Midtown should also provide the default terms of the MTA lease, showing whether the lease creates a substantial limitation on the rights of MTA, its transferees or assignees, to operate as common carriers on the Line (including a copy of any and all default provisions).

**Response** Midtown submitted the entirety of the MTA Lease as Exhibit B to its Motion To Dismiss. The submission included all the default provisions, as well as all the other terms of the MTA Lease.

The MTA itself provides only commuter service over the HH Line: it does not provide any freight service over the line. Accordingly, the MTA does not operate as a common carrier subject to the Board's jurisdiction. On the other hand, CSX and D&H are conducting freight transportation operations over the HH Line, and are thus operating as common carriers pursuant to their trackage rights over the line.

A hypothetical default by the MTA under the MTA Lease would not affect any MTA freight operations over the HH Line, since there are not now – and there never have been – any such operations. As to the rights of CSX and D&H to conduct freight operations over the HH Line pursuant to their trackage rights, such a default would have no effect Those operations would continue regardless of such a default. This is because the trackage rights operations of CSX and D&H over the HH Line are not subject to termination without Board authority [8] See, e.g., Thompson v Texas Mexican Ry., 328 U S 134, 147-48 (1946). Moreover, the MTA Lease incorporates a number of protections for assignees and sublessors of MTA, including a right to carry over in the event that MTA defaults under the MTA Lease.[9] See Midtown Motion To Dismiss, Ex. B at 33-37.

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[8] The trackage rights acknowledge that regulatory authority would be needed for CSX (formerly, Conrail) to "abandon" its freight operations over the HH Line See Midtown Motion To Dismiss, Ex C at 60

[9] It is not entirely clear that the trackage rights being exercised by CSX and originally granted to Conrail fall under these provisions of the MTA Lease There is a strong argument that, given the history of these trackage rights going back to the 1972 Lease, the trackage rights are independent of the MTA Lease and would be enforceable whether or not the MTA Lease was in effect For example, the trackage rights make clear that in the event they are terminated, this termination would have no affect on the parties' "rights and responsibilities under The Harlem-Hudson Lease Agreement, The MTA Purchase and Lease Agreement and The CTA Lease Agreement" See Midtown Motion To Dismiss, Ex C at 57.

## CONCLUSION

In the responses set forth above, Midtown has undertaken to provide the information available to it with respect to the matters identified by the Board If the Board has any questions in regard to the information provided or requires any additional information, Midtown would be pleased to respond.

Respectfully submitted,

By: _____

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ATTORNEYS FOR MIDTOWN TDR VENTURES LLC

Dated: August 8, 2007